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No. 04-749

IN THE

Supreme Court of the United States

ANDREAS PLONKA,

Petitioner,

-v-

RICHARD BROWN, DONALD LAWAWAY, STEVE CLARK, KAREN SASTRA, FRANK SCHAEFFER, RONALD DECKER, GERALD KRAMER, ANDREW SKROBANSKI, DEAN EDWARDS, LAWRENCE BROWN, ROBERT GOULDIN and MICHAEL GETMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED AS TO RESPONDENT GOULDIN

DID THE PETITIONER STATE A CAUSE OF ACTION FOR LEGAL MALPRACTICE AGAINST RESPONDENT GOULDIN, GIVEN THAT PETITIONER'S GUILTY PLEA TO CRIMINAL CHARGES PREVENTS HIM FROM ESTABLISHING A COLORABLE CLAIM OF INNOCENCE OF THE UNDERLYING OFFENSE?

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PRELIMINARY STATEMENT

Pursuant to Rule 15 of the Rules of the Supreme Court, this Brief in opposition is submitted on behalf of respondent Robert Gouldin, requesting that this Court deny petitioner Andreas Planka's application for Writ of Certiorari. Petitioner commenced this action in United States District Court for the Northern District of New York on February 4, 2002, alleging a number of constitutional violations and tort claims against both public officers and private citizens.

Respondent Robert Gouldin, a private citizen, provided legal representation to petitioner Planka in criminal proceedings in Otsego County, New York. Petitioners constitutional claims against respondent Gouldin were analyzed as legal malpractice claims by the District Court in respondent's motion to dismiss. The motion to dismiss was granted by Decision and Order dated July 2, 2003. The dismissal was affirmed by the Second Circuit of Appeals by Decision dated September 2, 2004.

STATEMENT OF FACTS

Respondent Robert Gouldin is a duly licensed and practicing attorney in the State of New York, with an office at 93 Main Street, Oneonta, New York. Petitioner Andreas Plonka hired Mr. Gouldin to represent him with regard to a number of criminal charges after prior counsel withdrew from petitioner's representation. The charges including four counts of second degree harassment, three counts of second degree criminal contempt, one count of second degree menacing, and a charge of bail jumping.

The appellant's previous counsel attempted to negotiate a plea bargain, but the prosecution's best offer involved one year of jail time. After taking over the case, respondent Gouldin negotiated a guilty plea that involved no incarceration. The appellant agreed to the plea bargain and was willing to admit guilt as long as he received only a financial sanction, contrary to his current claims that he was coerced into a negotiated disposition. Petitioner in fact received only a financial sanction, but was also subject to deportation proceedings with the U.S. Immigration and Naturalization Service based upon his conduct.

ARGUMENT

THE COURTS BELOW PROPERLY DISMISSED PETITIONER'S ACTION AGAINST RESPONDENT GOULDIN, AND PETITIONER RAISES NO GROUNDS FOR CERTIORARI HEREIN.

In his Petition for Certiorari, the petitioner frames the question presented for review as to respondent Gouldin as one of whether criminal defense attorneys should be "shielded" from malpractice suits if petitioner can show that he was deliberately misled and that the Court was made up of individuals who did not like him. Petitioner's original claim against respondent Gouldin was for constitutional violations. The Court analyzed this as a malpractice claim, since there is no basis for a civil rights action against a private individual under these facts.

As a State tort claim, any malpractice allegation by the petitioner was properly analyzed under New York law. The New York State Court of Appeals has held that a plaintiff fails to state a cause of action in legal malpractice if a determination of guilt on the underlying criminal offense remains unchallenged. *Carmel v. Lunney,* 70 N.Y.2d 169, 511 N.E.2d 1126, 518 N.Y.S.2d 605 (1987). The *Carmel* Court held that a defendant who stands convicted upon a guilty plea cannot establish that any alleged malpractice was the cause of an injury:

> "To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense, for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie." *Supra* at 607.

The Court of Appeals more recently re-examined this principle and restated the rule in *Britt v. Legal Aid Society, Inc.*, 95 N.Y.2d 443, 741 N.E.2d 109, 718 N.Y.S.2d 264 (2000). The Court there stated:

> "To open the door for even a colorable claim of innocence, criminal defendants must free themselves of the conviction, for the conviction precludes those potential plaintiffs from asserting innocence in a civil suit." *Supra* at p. 446.

The petitioner herein has not set aside the criminal conviction. The petitioner chose to plead guilty to numerous charges against him in the hope of avoiding jail time. This result was accomplished, and the guilty plea remains undisturbed. It follows that he cannot establish that he would have been successful in a trial in the underlying criminal proceeding, nor can he establish that his conviction was due solely to his attorney's actions.

The petitioner also claims that respondent Gouldin is liable for failing to inform him of the immigration consequences of his conviction. Respondent Gouldin was hired to represent the plaintiff in a criminal proceeding, and not in any immigration law matters. The New York Court of Appeals has held that a criminal defense attorney need not advise a defendant of the possibility of deportation, because it is a collateral consequence outside the control of the Court. See *People v. Ford*, 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995).

It has also been held that federal constitutional rights to effective assistance of counsel are not violated merely because the criminal attorney fails to advise a defendant of the possibility of deportation. *United States v. Delarosario*, 902 F.2d 55 (D.C. Circuit, 1990), cert denied 498 U.S. 942, 111 S.Ct. 352, 112

L.Ed. 316 (1990). The "failure to advise a defendant of the possibility of deportation does not affect the voluntariness of the guilty plea or require vacating the plea." *People v. McDonald*, 296 A.D.2d 13, 745 N.Y.S.2d 276 (3rd Dept., 2002), affirmed 1 N.Y.3d 109, 802 N.E.2d 131, 769 N.Y.S.2d 781 (2003).

Like a defendant whose criminal conviction is not overturned based upon an attorney's alleged failure to advise of consequences unrelated to the criminal prosecution, the petitioner herein, whose conviction has not been overturned, may not assert a malpractice claim against the attorney representing him at the time of his guilty plea.

CONCLUSION

The District Court properly dismissed the petitioner's Complaint herein, and the dismissal was properly affirmed by the Second Circuit Court of Appeals. The petitioner has raised no novel issues making his case appropriate for this Court's review, and his petition should be denied.

Dated: December 29, 2004
Vestal, New York

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